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Bronx, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

NEWSPAPER AND MAIL DELIVERERS'
UNION OF NEW YORK AND VICINITY

and **Case No. 2-CB-20110**

NYP HOLDINGS, INC.

***Lauren Esposito, Esq*., New York, NY,**
for the General Counsel.
Lowell Peterson, Esq. (Meyer, Suozzi, English & Klein, P.C.),
New York, NY, for the Respondent.
Elliot S. Azoff, Esq. (Baker & Hostetler, LLP),
Cleveland, OH, for the Charging Party.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based upon a charge filed on January 18, 2005 by NYP Holdings, Inc. (Employer), a complaint was issued on April 28, 2005 against the Newspaper and Mail Deliverers' Union of New York and Vicinity (Respondent or Union). The complaint alleges essentially that the Respondent failed and refused to execute an agreed-upon supplement to the collective bargaining agreement in violation of Sections 8(d) and 8(b)(3) of the Act.

The Respondent's answer denied the material allegations of the complaint, and asserts the affirmative defenses that the matter must be deferred to arbitration, and that the General Counsel and the Employer are not entitled to the remedies they seek.[1] On August 9 and 10, 2005, I heard this case in New York, NY.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

Findings of Fact

I. Jurisdiction

The Employer, a corporation having its office and place of business at 900 East 132nd Street, Bronx, New York, has been engaged in the publication of the New York Post, a daily newspaper. The Employer annually derives gross revenues in excess of $200,000. It holds membership in and subscribes to interstate news services, publishes nationally syndicated features, and advertises nationally sold products. The Respondent admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act, and that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The Respondent has offered no proof regarding deferral to arbitration.

II. The Alleged Unfair Labor Practices

A. Background

The Employer and the Union have had a collective-bargaining relationship for many years. Their most recent agreement runs from 2003 to 2010. The Union represents a unit of drivers who deliver the newspapers to dealers, and utility persons, dispatchers, machine operators and clerks. The Employer also has contracts with eight other unions.

Joseph Vincent, the Employer's vice president of operations, is responsible for its South Bronx facility which prints the newspapers. Kenneth Chiarella, the director of distribution for the Employer, is responsible for the daily delivery of the newspapers. Edward Francione is the general foreman of the distribution department, whose responsibilities are the day-to-day operations in the newspaper's distribution. The Union's officials are its president Ronald O'Keefe, and Thomas LoDico, who at the time of the instant dispute, was its business agent.

During the negotiations which led to the 2003 agreement, Vincent was the Employer's chief negotiator, and Chiarella assisted. O'Keefe was the Union's lead negotiator, and LoDico assisted him. Other meetings held outside the presence of the full committees were attended by those four individuals.

Chiarella stated that at the conclusion of the 2003 negotiations, he and Vincent asked what was necessary in order to obtain ratification for "finalizing" the contract. O'Keefe and LoDico replied that a vote of the shop would take place, then it would be presented to the Executive Council for its recommendation, and finally voted on by the general membership. [2]

According to the Union's Constitution and By-Laws of 1984, the Executive Council has the "power to propose rules governing matters not otherwise provided for by the Constitution and By-Laws and prevailing wage scale… and shall hear all matters in dispute among members of the Union or between members and the Union." The Council decides on membership and pension fund applications. It can also impose penalties for violations of the Constitution and By-Laws.

The Union's Constitution and By-Laws of November 22, 2004 gave additional powers to the Executive Council. It stated that the Council "shall be empowered to review and make recommendation on any proposed Four-Man Board agreements, amendments to an existing contract or on any agreement that would grant concessions on existing contracts, before any such proposals can be consummated." The new provision was adopted at a Special General Body Meeting on February 7, 1999. It was proposed because a previous Union president made an agreement with an employer "without anyone's knowledge," which had the effect of causing two employees to lose their guaranteed lifetime jobs, and resulted in the loss of the shop. According to O'Keefe, this provision became effective when adopted in 1999, and was reflected in the current printed version of the Constitution dated November, 2004.

B. Negotiations for the Alleged Agreement

The newspaper is delivered by three methods, as set forth in the contract. The first, called direct delivery, involves the delivery of newspapers from the publisher by employees

[2] The 2003 contract was not ratified until the third vote of the general membership.

represented by the Union directly to the retail dealer at which they are sold to the public. Combined delivery is the transportation of the newspapers from the Bronx facility by Union drivers to independent wholesalers which are signatories to a contract with the Union. The wholesaler then delivers them to retail accounts. Alternate delivery involves the transportation of the newspapers from the Bronx facility by Union drivers who deliver them to an independent wholesaler which does not have a contract with the Union. Employees of those companies then deliver them to their final destination.[3]

The 2003-2010 contract provides that 24,000 newspapers shall be delivered by combined and alternate delivery in the direct territory of the Employer, which includes the five boroughs of New York and an H-1 route in Hoboken, New Jersey, and that this arrangement "may continue unaltered, subject to certain conditions or to "change made by the mutual agreement of the parties."

The contract also required that the Employer "mark" the direct delivery papers so that they can be distinguished from those delivered by combined and alternate delivery systems. The physical mark would be made during the manufacture of the newspapers, and enabled the driver to readily observe whether unmarked newspapers were improperly being delivered to locations where only direct deliveries should have been made.

Following the execution of the 2003 contract, the Employer found that the facility's floor in which the marking equipment would be located was structurally unsound, and the equipment could not be installed until the floor was renovated. The Union granted the Employer a short extension of time within which it was required to mark the papers, and the Union filed a grievance over this matter on May 10, 2004.

Shortly thereafter, in early June, Chiarella called LoDico and discussed with him the Employer's continued difficulty in marking the newspapers, various open grievances, and the Employer's desire to increase the number of newspapers distributed by alternate delivery. LoDico offered his own list of items which would be beneficial to the employees. Specifically, the Union sought (a) the reinstatement of discharged employees James Lee and Salvatore Arra (b) the convening of the Adjustment Board to increase the number of names on the seniority list (c) an increase, by one, in the 184 "regular situation holders" (regular employees on the seniority list as set forth in the contract) to equal the number of jobs being performed [4] (d) to post the bid job of James Testagrose, who also holds another job with the Employer (e) the payment to Anthony Piazza of $900 for damage to his van (f) the assignment of delivery routes to Boston and Baltimore-Washington to Union drivers employed by the Employer (g) the assignment of a "tailman" (helper) on Brooklyn route K15 and (h) the addition of four to five new routes to the 81 direct routes guaranteed in the collective-bargaining agreement, and an increase in the number of regular situation holders by the number of routes added.

Chiarella discussed the Union's requests with Vincent and Elliot Azoff, the Employer's attorney, and presented a counter proposal on June 17. The Employer agreed to (a) reinstate Lee and Arra (b) have an Adjustment Board with names proposed by the Union, but with the Employer's language (c) increase the number of regular situation holders to 184 (d) post

[3] See *Newspapers & Mail Deliverers (New York Post),* 337 NLRB 608, 611 (2002).

[4] The Adjustment Board is a four-person committee, two designated by each party, having exclusive jurisdiction over matters concerned with the hiring and seniority of employees. The decision of a majority of the Adjustment Board is binding on the parties and "shall be" enforceable as an arbitration award in court.

Testagrose's job (e) pay Piazza $900 (f) provide a tailman to route K-15 only on the weekends and (g) add five routes, totaling 86, and increase the regular situation holders by five, to 189.

The Employer's counterproposals also included (a) permanently eliminating the requirement that it mark the newspapers (b) adding 20,000 newspapers to the alternate delivery system (c) withdrawing the Commemorative Coin arbitration and (c) the Union's agreeing not to file any grievances with the Circulation Committee for 24 months and (e) for each route over 86, there will be an additional 4,000 newspapers delivered by alternative delivery, and for each route fewer than 86, reduce the number of alternately delivered newspapers by 4,000.

Chiarella met with LoDico on July 2. LoDico added new demands to the Union's previous list, including (a) adding a Boston run, compensated as a regular, seven days per week shift plus 8 hours of overtime (b) increasing the amount of overtime on the Middletown, NY run from three to four hours per shift (c) equalizing the number of regular situation holders with the number of jobs by increasing the number of regular situation holders (d) adding one floor relief job (e) adding five routes plus two relief jobs (f) guaranteeing 88 routes (g) requiring that the Employer mark the newspapers (h) prohibiting the Employer from using vehicles larger than a Navistar or International truck for deliveries within New York City limits (i) adding 1½ hours of overtime per day for LoDico (j) adding two hours of overtime to the DSA route and (j) converting two temporary relay positions to permanent positions.

Chiarella, Vincent, and Azoff discussed the matter with Jeff Booth, the Employer's general manager, who was consulted because of the financial impact the Union's proposals would have.

C. The July 29 Meeting

On July 29, Chiarella and Vincent met with Union officials O'Keefe and LoDico. They worked from a document prepared by Chiarella. The parties first spoke about a deal involving the packaging and delivery of books. Chiarella showed the Union agents samples of the boxes which would hold the books. Vincent testified that an agreement was reached on the book arrangement.

At the meeting, the Employer and the Union also agreed to the following: (a) pay Piazza $900 for the damage to his van (b) reinstate Lee and Arra (c) post Testagrose's job and a job for one relief/chauffeur utility person (d) add a tailman to the K-15 route on Saturday and Sunday and (e) dismiss the Commemorative Coin delivery arbitration with prejudice. However, the Employer refused to increase the number of overtime hours to the Middletown route, and proposed adding two flash runs instead of adding two hours of overtime per day to the DSA route. The Employer also proposed increasing the number of direct routes in the following year from the current 82 to 88, but for each route added over the 81 guaranteed routes, it wanted 2500 additional newspapers to be distributed by alternate delivery. The Union refused to agree to this proposal. The Employer refused to add a Boston run as proposed by the Union, but offered to add three additional daily direct runs. The Employer agreed to increase the number of regular situation holders from 184 to 193 or to the number of bid jobs, but not fewer than 170. The Employer proposed that it no longer mark the newspapers, but the Union requested, and the Employer agreed that the marking would begin once the building renovation was complete. The Union refused to refrain from filing grievances, but said that it would "work" with the company to "make it as smooth as possible."

Chiarella testified that after all the items were discussed, the participants spoke about each item, agreed on language, and that the terms were "satisfactory to both sides," and a "final

consensus" was achieved. Chiarella also stated that they shook hands and all present said that they have a "deal."

Vincent specifically asked whether the agreement had to be approved by the Executive Council. Vincent and Chiarella quoted LoDico as saying "it's done. We have a deal." Vincent asked for an assurance from O'Keefe, and sarcastically asked whether they had a deal as they thought they had when they negotiated the last collective-bargaining agreement. That agreement was subject to three ratification votes before it was accepted. O'Keefe replied, according to Vincent and Chiarella "I'm the union president, and I'm telling you it's done." O'Keefe added that he wanted his attorney, Irwin Bluestein, to check the agreement and add any "legal language" he believed was appropriate, noting that he wanted to "send it by the executive committee for a recommendation only… not for their approval." LoDico then said "if I say it's done, it's done. I don't care what they vote." O'Keefe denied saying that he would sign the agreement regardless of how the Executive Council voted, and did not recall if LoDico said that. LoDico also denied making that statement.

O'Keefe testified that the major part of the July 29 meeting was the book deal. He denied that the main agreement was finalized at that meeting, noting that changes were made to the agreement following that meeting.

D. Events Following July 29

After the July 29 meeting, several written drafts of the agreement were circulated among the parties. After each draft was sent, each side discussed the matters with their attorneys, and then Chiarella and LoDico spoke about each item which each party wanted changed. The changes were added to the next draft which was then circulated. LoDico wanted three items removed from the main agreement and put in side letters. Those included the Piazza payment of $900, the Lee and Arra reinstatements, and the Middletown run. Chiarella agreed to that change.

A "final" draft dated August 14, 2004 was prepared by Chiarella and sent to O'Keefe on August 17. It included the three side letters, which were formalized by Azoff.

On August 23, Chiarella met with LoDico and the Union's shop chairman and shop committee at LoDico's request. LoDico wanted the shop committee to be informed of the agreement. Also present at the meeting were the Employer's foreman Francione.

Certain changes were made to the August 14 draft agreement at the meeting, and Chiarella then prepared a document entitled "8/16/04 modified 8/25/04" which he sent to LoDico. That agreement represented the final agreement of the parties. Essentially it provided that (a) one chauffeur-utility job and Testagrose's bid job would be posted within 14 days after execution of the agreement (b) one tailman's job would be added to the K-15 route on Saturday and Sunday (c) the DSA route would continue to be delivered, as it was currently, and the driver would continue to be paid two hours of overtime pay, and the Employer agreed to add one flash run (d) since there are 83 direct routes, two more than required by the contract, the Employer receives credit for one of those routes and may immediately increase the alternate delivery by 2,500 newspapers, to a total of 26,500. Within the following 12 months, the Employer plans to increase the number of routes to at least 88, with three routes added by December 31, 2004. For each route over 82, the Union agrees that the 24,000 alternate delivery limit will be increased by 2,500 newspapers, but that if the number of routes is reduced thereafter, the number of newspapers the Employer may deliver by alternate delivery will be reduced by 2,500 (e) the number of regular situation holders will be increased from 184 to the number of bid jobs,

and thereafter they will not be "attrited" below the number of bid jobs, or 179 (f) the Yankee coin delivery arbitration is dismissed with prejudice (g) the Employer will not have to mark the papers delivered by direct delivery until the renovation project is completed (h) the Union will not file any formal grievances until the parties have used their best efforts to resolve the matter and (i) the terms of the agreement supersede any conflicting representations, agreements or understandings, and it may be modified only by a writing signed by authorized representatives of the parties.

The agreement reached expressly modified the collective-bargaining agreement in that it increased the number of newspapers to be distributed by alternate delivery from 24,000 to 26,500, and gave the Employer an extension of time within which to begin marking the newspapers.

E. The Executive Council Meeting

As LoDico was preparing to present the agreement to the Executive Council, he asked the Employer for the galleys, which are lists of addresses to which the 24,000 newspapers being distributed by alternate delivery were sent. The Employer sent the galleys to LoDico. Chiarella stated that when he gave LoDico a document providing for the release of the galleys, LoDico told him that he did not care if the Executive Council rejected the agreement by a vote of 10 to 1, they had a deal, and he would sign it, and he promised to provide a signed copy of the agreement to Chiarella the morning after the Executive Council vote.

The Executive Council was scheduled to meet on September 7, 2004. That morning, O'Keefe asked for a letter stating that if the New York Times or the Daily News ceased doing business, their agreement would be "frozen" and would be renegotiated. O'Keefe reasoned that If those newspapers went out of business, the Employer's circulation would "skyrocket" resulting in increasing amounts of alternate deliveries. O'Keefe explained that he needed the letter in order protect the employees and to obtain a "recommendation" from the Executive Council on the agreement. Vincent testified that he was unhappy with this additional request, and asked "is this done?" O'Keefe, who supported the agreement and wanted to "get the deal approved" replied "it's done. We have a deal." Chiarella testified that LoDico told him that even if the Executive Council voted it down, a signed agreement would be delivered to Chiarella the following morning. Foreman Francione heard LoDico's statement. LoDico denied making that statement, but conceded telling Chiarella that he supported the agreement because he believed that the employees would benefit from its terms.

That evening the Executive Council discussed the matter, and according to O'Keefe, raised "some very valid points." O'Keefe was asked whether he would "go forward" with the agreement, and "I told them if you guys don't recommend it, we're not going forward with it" and he would "take your direction." The Council voted 8 to 2 against the agreement.

The following day, LoDico told Chiarella that he could not sign the agreement as it would be "political suicide." Francione heard that statement. O'Keefe told Vincent the same thing, adding that he could not "go up against these guys, I have an election coming up in May."

O'Keefe testified that with respect to an agreement with an employer which grants concessions to the Employer, it must go before the Executive Council for its recommendation. He defined "recommendation" as follows: "Historically in our union that means their vote and whether they vote for it or against or not. You take it from there. As the president of the union, you bring something to them and pretty much would follow their lead, they're our ten wise men so to speak." He stated specifically that he believed that he could go forward with the agreement

at issue here even if the Executive Council voted it down. In fact, he recently ignored the Council's rejection of another agreement at Hudson News, discussed below, and signed that agreement.

Chiarella and Vincent testified that they were not told by O'Keefe or LoDico during the negotiation of the agreement that Executive Council approval was required before the agreement could be signed. Rather, according to what they were told by the Union agents at the July 29 meeting and on September 7, the agreement was presented to the Executive Council for its recommendation only – not for its approval, and that it would be signed even if the Executive Council failed to give its recommendation.

F. Other Agreements Reached by the Parties

It is also arguable that the procedure utilized in reaching other agreements is evidence that the Executive Council's approval of the agreement at issue here was not required. LoDico was not certain whether agreements of four man boards have to be submitted to the Executive Council for its recommendation, but he believed that if the agreement changes the contract he would refer it to the Council. The agreements set forth below all involve arguable modifications to the collective-bargaining agreement, but apparently either the proposed agreement was not presented to the Executive Council, or the Council did not recommend it or approve it.

O'Keefe testified that he recently agreed to a modification of a collective-bargaining agreement with the Hudson News which involved a long-term agreement for 100 employees. The Executive Council voted not to recommend it, but O'Keefe disagreed with the Executive Council's reasons for rejecting it. He "took it to the next level" because he believed that the agreement was "best for the union," and it was passed by the membership.

On October 2, 2002, the parties here executed a "Final Wage Re-Opener Agreement," in which, pursuant to the prior collective-bargaining agreement, the parties agreed that wages be increased 2% effective October 1, 2001 and another 2% effective October 1, 2002. There was no evidence that the Executive Council approved this wage re-opener agreement before its execution. The Respondent argues that this agreement was not a change in the contract – LoDico said it was just "filling in the open spaces." In other words, there was an agreement in the contract that a wage raise would be given as of a date certain, but not the amount of the raise.

On February 24, 2004, a Joint Conference Committee was appointed, pursuant to Section 15 of the collective-bargaining agreement, to hear a grievance concerning the question of "what constitutes a coupon for purposes of the collective-bargaining agreement generally and the Coupon Agreement in particular." The Joint Conference Committee is a four member panel, two appointed by the Union and two appointed by the Employer, having "full and complete authority" to make a majority decision which is binding on the parties and "shall be" enforceable as an arbitration award in court.

This grievance arose concerning the assignment by the Employer of the employees to handle and deliver Master and Commander diskettes and IKEA catalogues. According to the Coupon Agreement set forth in the collective-bargaining agreement, employees receive specified additional pay for such work. Ordinarily, coupons are paper advertisements that are inserted into the newspaper. The Committee decided that (a) the disks and catalogs are coupons (b) instead of the dollar payment set forth in the Coupon Agreement, the employees shall receive one or one and one-half hours overtime pay for doing such work and (c) the grievance concerning this matter was withdrawn and settled. Chiarella testified that this

agreement was not approved by the Union's Executive Council. The General Counsel argues that this agreement is a clarification and modification of the contract's language as to what constitutes a "coupon." The Union argues that this was simply a settlement of a grievance, which does not have to be presented to the Executive Council.

The General Counsel argues that inasmuch as this agreement is entitled "Four Member Board" it was arguably subject to the same Executive Council review as the July 29 agreement pursuant to the 2004 version of the Union Constitution, which provides, as set forth above, that the Executive Council shall be empowered to review and make recommendation on any proposed "Four-Man Board agreements, amendments to an existing contract or on any agreement that would grant concessions on existing contracts, before any such proposals can be consummated." General Counsel further argues that the fact that this agreement was not presented to the Executive Council for its recommendation shows that recommendation or approval of the Council was not required.

On September 1, 2004, another agreement was entered into which implicated the Coupon Agreement. Chiarella and LoDico executed a "Classic Books" agreement in which a series of 15 classic books would be delivered by employees over a 16 week period. It was decided that the employees would be paid overtime in lieu of the payments set forth in the Coupon Agreement, similar to the Master and Commander agreement, but in some cases, would be paid pursuant to the Coupon Agreement. This agreement stated that any grievances arising from it would be resolved pursuant to the dispute resolution system of the contract, and it could be enforced by arbitration.

Chiarella testified that the Executive Council did not approve the Classic Book Agreement, and he was not told by any Union agent that Executive Council approval was required prior to its execution. He stated that the effect of this agreement was to modify the payment terms of the Coupon Agreement so that it would apply to this agreement, and instead of compensating the employees with a specific dollar amount, as provided in the collective-bargaining agreement, overtime hours would be applied instead.

LoDico testified that the Master and Commander agreement was the decision of a four man board, which he defined as an agreement which does not change the collective-bargaining agreement since the contract was silent on the Master and Commander agreement. Rather, the agreement simply added a new product to what the employees were to deliver. He further stated that neither the Master and Commander nor the Classic Book agreement modified the terms of the collective-bargaining agreement, but were new items as to which the contract was silent. In addition, he noted that the Master and Commander Agreement was the settlement of a grievance. He further noted that the Classic Book Agreement was a four man board signed only by LoDico and Chiarella, but that the July 29 agreement was a contractual modification which had to be approved by the Executive Council pursuant to the Union's bylaws. O'Keefe stated that the Classic Book Agreement was not intended to modify the collective-bargaining agreement, and it did not. Its "spirit" was to come to an agreement on the method of compensation for the delivery of a product that the Employer wanted delivered.

It is clear that inasmuch as the Adjustment Board and the Joint Conference Committee decisions are binding on the parties, pursuant to the collective-bargaining agreement, and "shall be" enforceable as an arbitration award in court, the Executive Council could only exercise the authority to recommend. Indeed, the Master and Commander agreement was not presented to the Executive Council for its review prior to its execution by LoDico, the shop chairman, and the two Employer signatories.

On February 24, 2004, Vincent and O'Keefe signed a "Cafeteria Plan," pursuant to which it "amended" the collective-bargaining agreement by providing that each employee contribute $6.00 per shift which is paid to the Welfare fund on a pre-tax basis, but "in all other respects, the contract shall remain in full force and effect in accordance with its terms." The purpose of the Cafeteria Plan was to ensure that the Welfare Fund would have enough money to pay its benefits to the workers.

O'Keefe stated that the "spirit" of the Cafeteria Plan was not to amend the contract, which was not negotiated and which did not modify the Employer's obligation under the contract. There was no evidence that the Executive Council approved the agreement before it was executed, and Vincent stated that it did not.

Analysis and Discussion

Section 8(b)(3) of the Act provides that it is an unfair labor practice for a union to refuse to bargain collectively with an employer. Section 8(d) states that bargaining collectively includes the "execution of a written contract incorporating any agreement reached if requested by either party," and it is an unfair labor practice to refuse to sign such an agreement. *Health Care Workers Local 250 (Trinity House),* 341 NLRB No. 137, slip op. at 4 (2004); *Demolition Workers Local 95*, 330 NLRB 352 (1999).

Based upon the above evidence, I conclude that (a) the parties reached final agreement on about August 25, 2004 (b) the Union's negotiators did not notify the Employer that the Executive Council's approval was necessary before they could sign the agreement (c) the by-law relating to the Executive Council's deliberations required only that the Council review and recommend the proposed agreement and (d) the Union's negotiators at all times assured the Employer's agents that the agreement would be signed regardless of the Council's action.

The Respondent argues that no agreement was reached at the July 29 meeting when the participants announced that they had a "deal." Based on the evidence, I find that agreement was reached that day on various terms which were discussed by the parties. However, I find that no final or complete agreement was reached that day. Several drafts of an agreement were circulated among the parties thereafter, and modified in each draft. Finally, a document entitled "8/16/04 modified 8/25/04" was sent by Chiarella to LoDico.

That document and the three attached side agreements constituted the final, agreed-upon document which was presented to the Executive Council on September 7. Indeed, the Union representatives supported the agreement and believed that the employees represented by the Union would benefit from it. They accordingly believed at that time that they had reached a final agreement with the Employer, and sought to obtain a favorable recommendation from the Executive Council. Similarly, the Employer's negotiators believed that a final agreement had been reached. Accordingly, the parties had reached a meeting of the minds as to this agreement. *Health Care Workers Union, Local 250*, above.

I therefore credit the General Counsel's witnesses who testified that at the July 29 meeting, Union representatives LoDico and O'Keefe agreed that they had a "deal." At that time it was an agreement reached in principal on various issues of concern to them. It was not a final agreement and it is not claimed that it was. Rather, additions, deletions and modifications took place thereafter.

I further credit the General Counsel's witnesses' mutually corroborative testimony that on September 7, before the Executive Council vote, LoDico and O'Keefe again confirmed that

the deal was "done" and that LoDico said that the agreement would be signed even if the Executive Council refused to give its recommendation.

I find support for that finding in O'Keefe's testimony that he could sign an agreement even if the Executive Council rejected it. The fact that the Council asked him if he would "go forward" with the agreement even if the Council rejected it is proof that he had that power. The November, 2004 Constitution and By-Laws provides only that the Council may "make recommendation" to various agreements. It does not require the Council's approval before an agreement is signed, and it does not state that agreements could not be reached without its recommendation. It provides only that the proposed agreement be presented to it for its review and recommendation.

The Respondent's answer to the complaint denies the agency status of O'Keefe and LoDico. Those men negotiated the 2003-2010 collective-bargaining agreement, and LoDico negotiated and signed other agreements, set forth above, without the Executive Council's intervention. In addition, they held themselves out to the Employer as acting at all times in behalf of the Union, and able to sign an agreement even if the Executive Council failed to give its recommendation to it. Accordingly, O'Keefe, as the president of the Union, and LoDico, as its business agent, possessed apparent authority to negotiate the agreement at issue here, and to sign it. *Demolition Workers*, above, at 357; *Carpenters Local 405*, 328 NLRB 788, 792-793 (1999).

While it is true that the Union's negotiators told the Employer's agents that they had to present the proposed agreement to the Executive Council for its review and recommendation, they did not advise that the Council's favorable recommendation was required for an agreement. If such approval was a condition precedent to a final and binding agreement, such a requirement must have been conveyed to the Employer by "clear and unambiguous notice." *Auto Workers Local 365 (Cecilware Corp.),* 307 NLRB 189, 193-194 (1992); *Pacific Coast Metal Trades Council (Lockheed Shipbuilding),* 282 NLRB 239, 244-245 (1986). The Union's failure to notify the Employer that the Executive Council's approval was required, permits the conclusion that O'Keefe and LoDico were authorized to conclude the agreement. *Mine Workers (Arch of West Virginia),* 338 NLRB 406 (2002). *Carpenters Local 405,* above, 328 NLRB at 405. The only condition precedent presented to the Employer was the requirement that the agreement be given to the Executive Council for its review and recommendation. As set forth above, the Union's negotiators assured the Employer's agents that the Council's recommendation, and not approval, was all that was required.

Indeed this is consistent with the reason for that by-law's enactment. A prior president signed a letter with no notice to the Union which resulted in the loss of lifetime job guarantees to two employees and the loss of a shop. The purpose of the by-law was to provide notice of a proposed agreement so that it could be reviewed. That requirement was satisfied here when LoDico and O'Keefe presented the proposed agreement to the Executive Council on September 7.

In support of the above, O'Keefe testified that after the Council refused to recommend a modification to a collective-bargaining agreement with the Hudson News, he signed it anyway. The by-law provides that the Council must recommend amendments to an existing contract or any agreement that would grant concessions on existing contracts. O'Keefe clearly agreed to an amendment to an existing contract by agreeing to its modification, notwithstanding the Council's refusal to recommend it.

The Respondent argues that, according to its language, the by-law applies only to those

proposed agreements which grant concessions to an employer, and since there was no proof that concessions were granted to the Hudson News, O'Keefe's actions did not contravene the by-law. I do not agree. The by-law required only the Council's recommendation, not its approval. In this regard, I credit Vincent's testimony that at the July 29 meeting, O'Keefe and LoDico said that they wanted to present the agreement to the Executive Council for its "recommendation only... not for its approval."

The Respondent argues that if the Employer believed that Executive Council approval was not necessary, it need not have acceded to the Union's last-minute requests for the galleys and for a letter stating that if other New York newspapers go out of business, the agreement would be renegotiated. Understandably, the Employer's negotiators wanted to provide O'Keefe and LoDico with whatever information they sought to present to the Council, and the Union's agents proclaimed that such documentation was all they needed. Naturally, the Employer would want their presentation to the Council to go well, and it may be presumed that the Employer looked forward to a favorable vote by the Council. However, that does not alter the evidence that the Employer was led to expect that the agreement would be signed notwithstanding the Executive Council's failure to give its recommendation. The evidence supports a finding that the Employer was repeatedly assured that the agreement would be signed even if the Council rejected it.

I accordingly find and conclude that the Respondent violated the Act by refusing to sign the agreement entitled "8/16/04 modified 8/25/04," and the three attached side agreements

Conclusions of Law

1. NYP Holdings, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Newspaper and Mail Deliverers' Union of New York and Vicinity is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing, since on or about September 8, 2004, to execute a written contract embodying the agreement reached on about August 25, 2004, the Respondent violated Sections 8(b)(3) and 8(d) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent, as the exclusive representative of the employees in the unit set forth in the 2003-2010 collective-bargaining agreement, unlawfully refused to execute the agreement entitled "8/16/04 modified 8/25/04" and the three attached side agreements, it shall be ordered to execute those documents.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec.

Continued

ORDER

The Respondent, the Newspaper and Mail Deliverers' Union of New York and Vicinity, New York, NY, shall

1. Cease and desist from

(a) Refusing to execute the agreement entitled "8/16/04 modified 8/25/04" and the three attached side agreements.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the agreement entitled "8/16/04 modified 8/25/04" and the three attached side agreements.

(b) Within 14 days after service by the Region, post at its union office in Long Island City, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 25, 2004.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by NYP Holdings, Inc., if willing, at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 9, 2005.

Steven Davis
Administrative Law Judge

102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to execute the agreement entitled “8/16/04 modified 8/25/04” and the three attached side agreements.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL execute the agreement entitled “8/16/04 modified 8/25/04” and the three attached side agreements.

NEWSPAPER AND MAIL DELIVERERS’ UNION OF NEW YORK AND VICINITY
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER, 212-264-0346.